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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1084~~ 188

PAN AMERICAN CASUALTY COMPANY
(Petitioner)

versus

EDWIN L. REED, JR. and
MARY ANN BERNARD REED
(Respondents)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Pan American Casualty Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 16, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 240 F. 2d 336.

JURISDICTION

The judgment of the Circuit Court of Appeal was entered on January 16, 1957. Rehearing was denied on February 13, 1957. An extension of time within which to petition

for certiorari was granted on May 16, 1957 extending the time to petition for certiorari until June 14, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTION PRESENTED

Is a plaintiff relieved from proving the cause of death of a prematurely born infant (who lived only 36 hours) when its premature birth results from trauma to the mother?

May the mother to one plaintiff and the mother-in-law of the other plaintiff, be called as an adverse party under Rule 43 (b) of the Federal Rules of Civil Porcedure merely because she was insured by the defendant insurance company?

STATUTES INVOLVED

This case involves the application of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and 28 U.S.C. 725:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply.

There also is involved Rule 43 (b) of the Federal Rules of Civil Procedure, which provides:

> A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contra-

dict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

STATEMENT OF THE CASE

This is an action by Edwin L. Reed and his wife, Mary Ann Bernard Reed, for individual personal injuries and for the death of a prematurely born child. The two plaintiffs were passengers in an automobile owned and driven by Mrs. Ethel Bernard, mother of Mary Ann Bernard Reed. Mrs. Bernard was rushing her daughter, who was 7½ months pregnant, to the hospital. It was necessary that Mrs. Bernard drive her daughter and son-in-law to the hospital because they had no automobile. While en route to the hospital, Mrs. Bernard had a collision with a cow. Edwin L. Reed and Mary Ann Bernard Reed allegedly received some slight injuries as a result of the accident. A passer-by took the parties on to the hospital. Shortly after arrival Mary Ann Bernard Reed gave birth to a child. The plaintiffs contended that the pains that Mary Ann Bernard Reed was having were **false** labor pains and the automobile accident caused the birth of the child. This was the contention in spite of the fact that she was being taken to the hospital because of the pains.

The child cried lustily at birth and was not injured in any manner whatsoever. It lived 36 hours. Its death was attributed to atelectasis (failure of the lungs to expand), which, the testimony showed, is present in every birth.

All of the doctors who attended the mother and the child testified that the accident did not cause the premature birth or the death of the child. Plaintiffs in adducing their proof propounded hypothetical questions to other medical experts.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

This action was brought in the United States District Court in and for the Western District of Louisiana, Opelousas Division, because of the diversity of citizenship between the plaintiffs, who are domiciled in the State of Louisiana, and the defendant insurance company, Pan American Casualty Company, who is domiciled in the State of Texas.

REASONS FOR GRANTING THE WRIT

1. The holding of the Circuit Court of Appeal as to the requirement of proof of causal connection between the automobile accident and the death of the child is contrary to the law of the State of Louisiana. In its opinion the Court of Appeal stated:

> There is no dispute over the principles that govern the submission of such an issue to a jury. It is incumbent on one seeking a recovery to present probative facts from which, standing alone or forming the basis of expert testimony, the causal relation can reasonably be inferred. *Fort Worth & Denver City Ry. Co. v. Smith*, 5 Cir., 206 F. 2d 667. The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway v. United States*,

319 U.S. 372, 395; 63 S. Ct. 1077, 87 L. Ed. 1458.

The proof of causal connection has received much consideration by the courts of Louisiana, of other States and text writers. Some States do not permit actions for injury to unborn infants or for death because of premature birth as a result of trauma to the mother and child. In Prosser on Torts, *Prosser*, Second Edition, p. 174 we find the following statement:

> * * * Where a pregnant woman is injured, and the child subsequently born suffers deformity or other injury as a result, nearly all of the decisions prior to 1949 denied recovery to the child. Two reasons usually were given: First, that the defendant could owe no duty of conduct to a person who was not in existence at the time of his action; and second, **that the difficulty of proving any causal connection between negligence and damage was too great and there was too much danger of fictitious claims.** As to the second, it seems clear that adequate safeguards could be established by requiring sufficient proof by competent medical evidence, which is possible at least in many cases. The difficulty would seem to be no greater than in the case of many other matters of medical opinion on the causal sequence of events. (emphasis added)

On this point the Court of Appeals held:

> * * * There is still the question, however, whether having found that the automobile accident caused the early birth the jury could infer that the death from atelectasis was traceable to the accident. While no case has been cited by appellee to support this proposition we hold that if the right of the infant to the start in life that results from nature's scheme of

> granting a nine months' period of gestation is shown to have been violently interfered with by the negligent act of another, and it is shown, as it has been here that such interference substantially increased the chances of death from the defect that actually caused death, then the jury may attribute the fact of death to the negligent act that caused the premature birth.

What has concerned jurist for centuries was completely overlooked and ignored by the Circuit Court of Appeal, i.e. causal connection between the accident and death. The effect of its holding is to allow recovery for death, disease, deformity or condition following a premature birth caused by trauma even though there is no proof of causal connection. Such a holding certainly will permit fictitious claims.

The controlling case in Louisiana on this point is *Perez v. Carbrey*, 22 So. 2d 76 (Orl. Ct. of App. 1945). There the Court stated:

> * * * Our Courts must be bound by the written law. The burden of proof is on the plaintiff to make her case reasonably certain. It is most probable that a shot was fired by Carbrey prior to the tragedy, but probability cannot, under the law, set aside the strict exactions of legal requirements. Let the probability rise to the highest degree, it is nonetheless still probability.

In *Standard v. St. Louis-San Francisco Railway Co. et al.*, 108 So. 566 (Sup. Ct. of Ala. 1926) the Court stated:

> It may be that in a few instances hard cases may arise wherein a child may be burdened through life with an affliction produced before its birth, while, on the other hand, many

> cases might arise, should the rule be different, where the recovery would be based upon the merest conjecture or speculation as to whether or not the prenatal injury was the cause of the death or condition of the child.

In this cause, the medical experts in answer to hypothetical questions stated that the accident **could** have caused the premature birth or that it was **possible** or that it **might** have caused it. The law on this point is found in *Nuden v. New York, New Hampshire & Hartford Railway Co.*, 160 App. Div. 415, 94 N.Y.S. 825:

> What the law requires is evidence that a condition on which a recovery was sought was caused by an injury to the plaintiff caused by a negligent act of the defendant, and where a physical injury results, the law allows an expert can testify that in his opinion the condition was with reasonably certainty caused by the act of the defendant; but there must be some connection between a physical injury caused by the negligent act, and the condition for which a recovery is sought. The opinion of the witness that such a condition could result from such an injury is not proof of the fact that the condition did result from it.

The Circuit Court of Appeal stated:

> The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.

The law in Louisiana is that in addition to "mere speculation be not allowed to do duty for probative facts" the plaintiff must prove his case by a preponderance of the evidence. In *Roberts v. M. S. Carroll Company*, 68 So.

2d 689 (1953) the Court stated:

> * * * The jurisprudence of every appellate tribunal of this state has incontrovertibly established the rule that the plaintiff in a compensation case, as in other cases, bears the burden of proof. He is required to establish his claims to a legal certainty by a reasonable preponderance of the evidence. Speculation, conjecture, mere possibility, and even unsupported probability, are not sufficient to support a judgment. These principles have been stated, restated, iterated, reiterated, emphasized and re-emphasized in almost innumerable decisions, * * *

The Circuit Court of Appeal clearly did not apply the law of Louisiana which does not admit proof by speculation, conjecture, possibility or unsupported probability.

2. No lengthy argument need be made that a mother is not a hostile or adverse witness to her own daughter and son-in-law. The Circuit Court of Appeal recognized this to be true as it stated:

> It will be remembered that she was the mother of Mrs. Reed and the grandmother of the deceased child. Clearly, therefore, she could not be classed as a "hostile party" under Rule 43 (b) F.R.C.P.

The Court received the examination of Mrs. Bernard and held that no harm resulted to petitioner because none of the techniques of cross-examination were needed or much used. The rule thus established is that a friendly witness may be called as a hostile witness under cross-examination if none of the techniques of cross-examination are used. The rule admits of no such procedure and the law entertains no such fiction. The effect of the

cross-examination is not for the determination by appellate judges but by lower court jurors. We submit that this was clearly error.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Charles S. Murphy

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Counsel for Petitioner

Camille F. Gravel

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Counsel for Petitioner

CERTIFICATE

I certify that a copy of the above and foregoing petition for Writ of Certiorari has been served upon counsel for respondents, James G. Dubuisson and Felix DeJean, by depositing a copy of same in the United States Mail, with first class postage prepaid, addressed to them at their respective Post Office addresses in Opelousas, Louisiana.

Camille F. Gravel, Jr.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 16232.

PAN-AMERICAN CASUALTY COMPANY,
Appellant,

versus

EDWIN L. REED, JR., and MARY ANN BERNARD REED,
Appellees.

Jan. 16, 1957.

Rehearing Denied Feb. 13, 1957

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge.

This is an appeal from a judgment on a jury verdict against defendant insurance company sued under the Louisiana Direct Action Statute LSA—R.S. 22:655 by plaintiff passengers, husband and wife, for injuries suffered by them and for the death of their prematurely born child, in an accident caused by the negligence of the driver of the car, defendant's assured, the mother and mother-in-law of the plaintiffs. The three questions at issue here are: (1) whether plaintiffs sustained the burden of proof that the

infant's death was proximately due to the accident; (2) whether it was prejudicial error to permit the examination of defendant's assured by plaintiffs under cross-examination; (3) whether the failure to disclose the name of one of plaintiffs' witnesses during the pre-trial proceedings is such a violation of Rule 16 that a new trial should be ordered.

On June 25, 1953, plaintiff, Mrs. Reed, then seven and one-half months pregnant, started feeling pains and bleeding. A doctor, Dr. DeBlanc, was called, and later testified that he had diagnosed merely "false labor." He left but was later advised by phone that Mrs. Reed was again having pains and he advised a hospital check-up. Mrs. Reed's mother, Mrs. Bernard, defendant's assured, drove her daughter and son-in-law toward the hospital. Outside of Church Point, Louisiana, a cow wandered onto the road in front of the car. Mrs. Bernard lost control and the car ran into a ditch and turned on its side. Mrs. Reed was badly shaken up.

Help came and Mrs. Reed was taken to the hospital where a little time later she was delivered of her second child, who, although apparently healthy at birth, died 46 hours later of atelectasis, or failure of the lungs to expand properly.

The medical testimony was offered by several doctors. Dr. DeBlanc was of the opinion that Mrs. Reed was not in labor when he examined her but he advised her later to go to the hospital when pains were noticed. He did not see her thereafter as he was not her regular obstetrician. Dr. Bellard, Mrs. Reed's obstetrician, was away when the birth occurred, but he attended her and examined her within an hour after the delivery. He saw no evidence of injury to her or the baby. They both

appeared normal. Thereafter, some two or three hours later, the baby had repiratory trouble and it was placed in a compression chamber where it stayed under treatment until it died of atelectasis.. He said he could find nothing that showed the delivery was caused by an accident. He further stated: "In my opinion and experience I do not think the accident had any bearing on the delivery * * * " and also: "I do not believe there was any connection between the accident and the delivery of the child or the death of the child."[1] He also testified that the most frequent cause of deaths of both premature and full-time babies is atelectasis, and that more premature babies die from this cause than from all others.

Dr. Sinclair testified by deposition that he had performed an autopsy on the infant and had concluded that death was due to failure of the lungs to expand completely due to some cause which was not obvious at the time of the autopsy or on subsequent examination of the tissue sections. He found nothing to indicate that trauma had caused the condition.

Dr. Robertson, who testified only as an expert witness in response to hypothetical questions, stated that it was *possible* that the kind of accident that here occurred would cause a premature birth. He was not asked for, and therefore did not give, an opinion whether, assuming all of the facts might properly be accepted by the jury, this particular accident caused the premature birth.

Dr. Mayer, also testifying in response to hypothetical questions, said that in his opinion in the circumstances

[1] On cross-examination he testified that a jolting of the kind Mrs. Reed received frequently causes a premature delivery; also that a severe jolting accident to the mother *could* produce separation of the placenta; that such separation would bring on bleeding, and if the accident here was followed by excessive bleeding this "*could* be indicative of the fact that the placenta may have been separated."

related in the questions,[2] the accident "precipitated labor" and caused the birth of the child.

Dr. C. L. Keller, the obstetrician who was called to attend Mrs. Reed when it was impossible to reach her own doctor, testified to the fact that the birth was nor-

[2] The series of questions and the responses to them follows:

"Q. Now, Doctor, assuming that a woman has gone seven and a half months pregnant, and that some sort of trauma, or jerk, happens to her, such as getting into an automobile accident, wouldnt that be capable of bringing on premature birth?

"A. That is certainly possible, yes.

"Q: As a matter of fact, it does occur, does it not?

"A. It does.

"Q. Would you say that, assuming the length of pregnancy —would you say that the woman who was riding in an automobile on a gravel road in the country at a rate of speed of something around thirty-five to forty miles an hour, in which the driver of the automobile suddenly lost control of the car, and it went swerving down the road a distance of some hundred and fifty feet thereafter, landin a ditch with the automobile turned over on the right side—would you say that such an accident or occurrence could cause the premature birth of her baby?

"A. Definitely I think that trauma could and does sometimes start a woman into premature labor.

"Q. When you say 'labor' what does that mean?

"A. I mean labor preceding the birth of a child.

"Q. Going further, Doctor, with that assumption, suppose that that woman soon after the accident gave birth to a child, and further assuming that previous to the accident, say around two hours before the baby's birth, possibly a shorter time, possibly a longer time—that, you had examined her and found that she was just spotting, and that you made a pelvic examination and found that there was no dilation whatever, but that shortly thereafter she began to have pains which were not regular but sporadic, and not severe, and assuming that she then got into that automobile and got into that wreck, and immediately after the wreck she began to flooding, and that shortly before getting to the hospital she began to have severe and regular pains, and was flooding, what then would you say was the effect of that accident on the woman and the cause of the birth of that child, premature birth?

"A. Well, it certainly sounds to me like, as you stated before this accident the woman was not in pain, had the accident which precipitated labor, and later on gave birth to the child. I don't know that to be a fact, but that is my opinion."

mal except for the fact it was premature; the baby cried naturally immediately after birth; that he examined the placenta and there was no indication of damage to it and there was no indication of excessive bleeding prior to the birth. He testified that there was no evidence at the time he examined Mrs. Reed, either before or during the delivery, that would indicate that an accident was involved or related to the birth of the child and that there was nothing about the child that indicated that the child had been injured in the accident or that its birth was caused by the accident. He said: "The birth of the child was an absolutely normal delivery." On cross-examination he said it was *possible* that the accident *could* have caused this premature birth.

Dr. Prather, who was called in as a pediatrician to help with the treatment of the infant when it became apparent that it was in dangerous condition, diagnosed the condition as congenital atelectasis. He said a premature baby was more susceptible to the condition than a full-time baby. He then stated that "many of those babies who are born prematurely and die of atelectasis would not have died of atelectasis if they had been able to reach full time maturity."

Upon this medical testimony, which we have given rather fully, we are asked to hold that there was not sufficient evidence with all inferences that could be reasonably drawn from it, to warrant submission of the issue of causation to the jury.

We think this is so only if it appears from the record that the jury could not find on the evidence before it that labor had not commenced before the accident, for if the jury could have found that labor had not com-

menced before the accident, then there was sufficient evidence to warrant the necessary inferences of causation of the premature delivery and of the adverse effect of premature delivery on the incidence of atelectasis.

The unanimous medical testimony was to the effect that in every case of a birth there must be a period of labor, whether or not accompanied by labor pains. This was variously testified to by Dr. Robertson who said he had once seen an instance of labor of an hour and one of "less than an hour."[3] and that it took an average of six hours for a second baby at another place in his testimony; by Dr. Mayer who said that normal labor time was 12 to 14 hours, but that trauma might cause the shortening of the time to "a matter of" from one to two hours; by Dr. Keller, the doctor who delivered the baby, who said he had never known of labor of less than "about" two hours.

As is apparent from what we have said the issue narrows down to a point which is too fine for us to hold that the trial judge erred in submitting the case to a jury. There is evidence that trauma occurred; there is evidence that trauma frequently induces premature labor, and that under circumstances which the jury could find existed it did do so; that trauma causes "precipitant labor" and that the duration of labor in such cases may be from less than an hour to much longer periods. Further there is proof that after the accident there was a delay of fifteen minutes, followed by a trip of five miles in another automobile to the hospital.[4] Mrs. Reed then checked in at the hospital and time was consumed in an

[3] From his subsequent testimony it is apparent that he may have been talking of labor pains rather than labor itself, the process through which the organs go to permit the delivery of the baby.

[4] No one even estimated the speed of the car or the time consumed.

effort to reach Dr. Bellard. Dr. Mayer was then reached and he came to the hospital and about fifteen minutes later the baby was born. Absent a positive and unequivocal showing that labor must continue for a stated definite and certain period (and there was not such showing), there was no burden on plaintiff to show that the details above related consumed at least that period of time. They certainly consumed more than a half hour and may have taken over an hour, which would meet the minimum test set down by the testimony of two doctors.

[1, 2] There is no dispute over the principles that govern the submission of such an issue to a jury. It is incumbent on one seeking a recovery to present probative facts from which, standing alone or forming the basis of expert testimony, the causal relation can reasonably be inferred. *Fort Worth & Denver City Ry. Co. v. Smith*, 5 Cir., 206 F. 2d 667.[5] The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway v. United States*, 319 U.S. 372, 395, 63 S. Ct. 1077, 87 L. Ed. 1458.

[5] *Denver City Rwy. Co.*, 5 Cir., 219 F. 2d 43.

[3, 4] The difficulty arises in the application of the rule to the facts of the particular case. It is apparent here that the obstetricians who actually delivered Mrs. Reed's baby and later attended her thought the delivery was normal for a seven and a half months' pregnancy but they did not rule out the possibility of an induced labor, brought about by the trauma of the accident. It is also apparent from expert medical testimony that such trauma followed by heavy pains and profuse bleeding,

[5] *Cf.* subsequent appearance of the same case *Smith v. Ft. Worth &*

testified to by Mrs. Reed, continuing over a period of as much as an hour, might well bring about the premature birth. One physician testified that in his opinion it would do so. This was sufficient to take the case to the jury if the issue of the cause of premature birth is the end of our inquiry. See *Smith v. Forth Worth & Denver City Ry., supra.* There is still the question, however, whether having found that the automobile accident caused the early birth the jury could infer that the death from atelectasis was traceable to the accident. While no case has been cited by appellee to support this proposition we hold that if the right of the infant to the start in life that results from nature's scheme of granting a nine months' period of gestation is shown to have been violently interfered with by the negligent act of another, and it is shown, as it has been here that such interferences substantially increased the chances of death from the defect that actually caused death, then the jury may attribute the fact of death to the negligent act that caused the premature birth.

[5] We now come to the allegation of error relating to the court's permitting Mrs. Bernard, the assured, to be called by the plaintiff as an adevrse party and to be questioned as under cross-examination. It will be remembered that she was the mother of Mrs. Reed and the grandmother of the deceased child. Clearly, therefore, she could not be classed as a "hostile party" under Rule 43(b), F.R.C.P.[6] The trial court ruled that by the authority of our recent case of *Maryland Casualty Co. v. Kador*, 5 Cir., 225 F. 2d 120, the assured of a liability insurance carrier is an adverse party even though not named as a defendant in the suit. This undoubtedly was the holding of the *Kador* case. Appellant argues that

[6] Fed. Rules Civ. Proc. rule 43(b), 28 U.S.C.A.

that ruling should be limited to the facts in that case where the assured appeared to cooperate fully with the defense and it was not shown that there was a natural sympathy of the assured with the cause of the plaintiff, as is so obviously the case here. We do not find it necessary to determine whether such limitation should be placed on the ruling of that case, (though there is certainly much in the basic principles relating to examination of friendly and hostile witnesses to argue for such a limitation) because we are convinced that no prejudicial harm resulted to appellant from the ruling complained of. A careful reading of the questions and answers propounded to and elicited from Mrs. Bernard quickly demonstrates that none of the techniques of cross-examination were needed or much used to elicit the relatively thin case of her own negligence made out by her. In view of the wide latitude given the trial court in the method of examining of witnesses generally, and noting the harmlessness of the procedure here, we hold that no reversible error occurred from the court's ruling in this respect.

[6] So, too, do we fail to find any reversible error in the court's permitting Dr. DeBlanc to testify though he was not mentioned as a witness at the pre-trial hearing a few days before trial. Counsel for appellant did not move for a continuance or in any way call to the court's attention any objection to Dr. DeBlanc's testifying in order to permit the court, to prevent any injustice that might result from the failure to disclose the fact that he would testify. We cannot note on appeal and alleged error of this sort when it is apparent that counsel decided to chance the case with the jury rather than ask for a continuance and raised his objection for the first time on motion for judgment n. o. v.

Finding no reversible error, we affirm the judgment of the trial court.

Judgment Affirmed.